No. 15143

# In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

OLAA SUGAR COMPANY, LTD. AND ILWU LOCAL 142, RESPONDENTS

*ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD


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*ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD*

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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### JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board for enforcement of its order issued against respondents on October 26, 1955, pursuant to Section 10 (c) of the National Labor Relations Act, as amended.[1] This Court has jurisdiction under Section 10 (e) of the Act, the unfair labor practices having occurred on the Island of Hawaii, Territory of Hawaii, within this judicial circuit. The

[1] 61 Stat. 29 U. S. C. Sec. 151, *et seq.* Relevant portions of the Act appear in Appendix A, *infra*, pp. 35-39.

Board's Decision and Order (R. 77-99) [2] are reported at 114 NLRB 670.

## STATEMENT OF THE CASE

### I. The Board's Findings of Fact and Conclusions of Law

*Introduction*

The two respondents—Olaa Sugar Company, Ltd., herein called Olaa or the Company, and ILWU Local 142, herein called the Union—had a collective bargaining agreement, one clause of which provided that the Union could cause the Company to discharge employees who were not members of the Union for "disrupting harmonious working relations." The contract contained no similar provision with respect to union members. The Board held that by entering into this agreement, and by causing the discharge of, and discharging, employee Banez pursuant thereto, the Union violated Section 8 (b) (2) and (1) (A) of the Act and the Company violated Section 8 (a) (3) and (1). In so holding the Board rejected the contention of both respondents that Banez was an agricultural laborer not protected by the Act. The facts upon which these findings rest are summarized below.

A. The Company's operations

1. *The nature of the Company's business and the location of its properties*

Olaa, the sixth largest producer of raw sugar and molasses in the Territory of Hawaii, is engaged in

[2] References to the printed record are designated "R". In a series of references, those preceding the semicolon are to the Board's findings while those following it are to the supporting evidence.

growing cane and processing it into raw sugar and molasses (R. 24, 30; 11, 144). The mill or factory at which the cane is processed is located near Olaa Village and is separate and distinct from the growing fields (R. 27; 140, 141). Olaa annually produces raw sugar and related products valued in excess of six million dollars, most of which is shipped to the mainland (R. 30; 116, 133).

Approximately half of the cane processed at the mill is purchased from 438 independent growers, the remainder being grown by Olaa in its own fields (R. 24, 27; 173). The independent growers cultivate 6,911 acres which are intermingled among the 7,418 acres cultivated by the Company (R. 24, 27; 116, 132, 149). These fields, covering over 14,000 acres are divided into seven scattered sections which are connected by a network of two-way, paved, public highways (R. 29-30; 162-163, Empl. Exh. 2A).[3]

The largest section, Olaa-Mt. View, is approximately 14 miles long and 2 to 3 miles wide (Empl. Exh. 2A, 180). The mill, which has an appraised value of six to seven million dollars, and which employs 170 workmen, is located in the northeastern portion of this section on or near a public highway which runs through the section from east to west (R. 30; 141-143, Empl. Exh. 2A). A second section, Pohoa, lies 12 to 14 miles south of Olaa and is 5 to 6 miles long and 1 to 2 miles wide (R. 30; 141, 180, 185, Empl. Exh. 2A). It is connected with Olaa by a north-south public highway and by a more roundabout private road which follows an abandoned railroad bed (Empl. Exh. 2A, 131, 138).

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[3] Copies of this Exhibit, which is a map of the Company premises (R. 130) will be handed to the Court at the oral argument.

Both roads also lead to a third section, Kapoho, several miles to the southeast of Pohoa (Empl. Exh. 2A). The remaining four sections lie slightly farther south and west and are also serviced by both roads (Empl. Exh. 2A). The most remote of the latter sections, Kamaila, is 23 miles from the mill (R. 30; 141, 152).

In each section, private, one-way unpaved roads, totaling approximately 450 miles for the seven sections, branch off the public highways and cut through the fields (R. 29; 137-138). It is over this network of private and public roads, including a long public highway not contiguous to any cane fields, that the cane is transported to the mill.

2. *The transportation of the cane to the mill*

The contracts between the independent growers and the Company place the responsibility of planting, cultivating and cutting the cane on the growers who are also obligated to deliver the cane in piles of specified size to points within 300 feet of a private road (R. 24-27; 302-306). When this is done, the grower has fulfilled his contract; it is the Company's obligation to transport the cane to the mill (R. 26-27; 149). The Company also transports the cane grown on its own property to the mill.

Accordingly, the Company maintains a transportation section at its mill (R. 81, 31; 139, 175). In 1953 it had 19 truck-trailer combinations, each 64 feet in length and capable of hauling a load of 24 tons of cane (R. 31-32; 171-172, 175-177). Since hauling continues around the clock,[4] the Company employs 33 senior

[4] According to harvesting superintendent Mair, a witness for the Company, cane may lie along the roadside "as much as 48 hours" before being loaded (R. 157).

cane truck drivers under the supervision of a truck dispatcher who has his office at the mill, the central point of all trucking operations (R. 32-33; 159-160, 165-166). The dispatcher assigns the drivers to the various runs, instructs them what routes to take, and records the time when they leave the mill (R. 32-33; 160-161, 165-166). By means of radio-telephone, the loading foremen in the fields report the time of the trucks' arrival at the fields, the time at which loading begins, and the time when they leave for the mill (R. 32-33, 165-167). All loading is done on private roads, the piles of cane being lifted onto the trucks by a traveling crane (R. 33; 137-138; 157-158). During the loading operation, the drivers have no duties except to stay with the trucks, move them as required, and chop off any stalks of cane protruding from the vehicles that might create a hazard on the highway (R. 80, 33; 195-196). They have no duties during the unloading operation at the mill other than to maneuver the trucks into position (R. 195-196). During the few weeks between seasons, they work either in the mill or in the garage helping to repair the trucks (R. 52; 186-187).

The drivers spend approximately half their time in driving, and the remaining half is divided between loading in the fields (38 percent of their total time) and unloading at the mill (the remaining 12 percent) (R. 310). Of the driving time, approximately 60 percent is on public highways, as it is the Company's general policy to route the trucks over such roads to the fullest extent possible (R. 80; 190-191, 165). As already noted, *supra,* p. 4, some of the fields are as much as 23 miles from the mill and a considerable portion of the highways used are not contiguous to the

cane fields. Approximately half of the cane hauled by the drivers is grown by independent growers (R. 81; 182-183).[5]

The drivers operate only cane trucks (R. 34; 169). Vacancies are posted and are filled by the Company on the basis of ability, with due consideration being given to seniority and other relevant factors (R. 34; 169). The drivers' job description sets forth in detail the abilities required and the duties to be performed; all relate to the proper maintenance and safe operation of the trucks (R. 34; 154, 307-310). Their hourly wage rate is $1.28 as compared to $1.10½ base pay plus incentive bonus paid cane field employees (R. 198). There is no suggestion in the record that there is any interchange between the two groups.

On the basis of the foregoing facts the Board found that the Company's trucking operation is "carried on as an incident to or in conjunction with its plant operations rather than its farming operations" and held, Member Rodgers dissenting, that the senior cane truck drivers, who haul cane grown by independent contractors as well as that grown by their employer, are not exempt from the Act as agricultural laborers (R. 81, 84-85, 93-95).

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[5] The following table shows the approximate amount of time spent by Olaa's drivers in their various activities (R. 310):

| | | |
|---|---|---|
| I. Driving time—50% | | |
| Time on public highways | | 30% |
| Time driving through Olaa's fields | | 10% |
| Time driving through independent fields | | 10% |
| II. Non-driving time—50% | | |
| Time unloading at mill | | 12% |
| Time loading in fields | 38% | |
| Time loading at Olaa fields | | 19% |
| Time loading at independent fields | | 19% |

B. The unfair labor practices

1. *The illegal contract provision*

At all times material herein, respondents were parties to a collective bargaining agreement, Section 1, paragraph 8 of which provided that (R. 35; 297-298):

> Any claim by the Union that action on the job of a nonunion employee covered by this agreement is disrupting harmonious working relations may be taken up as a grievance. Repeated disruption of harmonious working relations shall be grounds for discipline or discharge.

The contract contained no comparable provision for similar conduct by an employee who was a union member.

2. *The discrimination against Banez*

Favorito P. Banez was first employed by the Company in February 1946 as a cane cutter and continued in its employ until December 17, 1953 (R. 35, 42, 119). At the time of his discharge, he was a senior cane truck driver, driving one of the large trucks which hauled cane from the fields to the mill *(ibid.)*. Banez joined the Union in 1946 but paid no dues after 1951 and was not a member in the fall of 1953 when the events here in issue occurred (R. 36-37; 124, 129-130, 213, 226-227, 287). Since the collective bargaining contract contained no union security clause, Banez was not required to join or remain a member of the Union in order to retain his employment.

Up to and including 1953, the cane was cut by hand, but the Company had been planning for some time to mechanize the field operations (R. 37; 137). The

change-over would reduce the number of employees from 1100 to 540 and the first step was scheduled for December 1953 (R. 37; 235). Approximately 75% of the reduction would be in the field force made up largely of Filipino employees (R. 37; 235, 251-252). The Company was apprehensive that the reduction would give rise to labor trouble, particularly among the Filipinos, and desiring to effect the change with as little friction as possible, discussed the situation with the Union (R. 37; 254, 263-264). It was agreed between them that the reduction would be based on seniority and ability to do the work, with consideration being given to "hardship cases" such as employees with large families (R. 37-38; 264-265).

In August, the Union learned that three employees, Banez, Dela, and Revera, were circulating a petition for the purpose of calling a general membership meeting to clear up some misunderstanding between the rank and file members of the Union and the officers thereof (R. 38; 203-206). After having investigated the matter, the Union's executive board requested a meeting with Company officials (R. 38; 120-121, 208).

At the meeting on October 19, the Union spokesmen informed the Company that Banez, Dela, and Revera were circulating a petition, that a copy was not available, but that the petition was critical of the Union's officers (R. 39; 209-211, 213-214, 224). The Union also asserted that Banez had accused the officers of having favored employees of Japanese extraction in working out the arrangements for the layoff and in job opportunities generally, to the detriment of the Filipino employees (R. 39; 225). The Union also described various incidents of alleged improper conduct by Banez, including delinquencies in his work and deroga-

tory remarks about the Union's officers (R. 39-40; 224-225). The Union claimed that Banez' criticism of the Union's officers had created racial antagonism between the officers and members of Japanese extraction on the one hand and the Filipino employees on the other with the result that the latter wanted to strike in protest against the layoff procedure (R. 40; 210-212, 232-234).

The Union informed the Company that Banez was not a member of the Union and that it was presenting a grievance with respect to him under Section 1 of the contract (R. 40; 124-125, 226-227). The Union's position was that Banez' conduct had "disrupted harmonious working relations," and it demanded that the Company take action against him pursuant to that section (R. 40; 209-212, 218-220). In effect, as Union Vice-President LaTore admitted at the hearing, the Union could not fire Banez itself and was asking the Company to do so (R. 41; 214-215). As Dela and Revera were Union members, the Union expressed the belief that it could "take care of" them (R. 40; 234). The Company in turn stated that its "relations with the Union had been satisfactory," that it "hoped they would continue that way"; that action which tended to stir up racial antagonism was a very serious problem and that such conduct "by any employee" could not be tolerated (R. 40; 227-228). The Union also discussed the Banez matter with the Company on several occasions thereafter (R. 269-271). Banez was not notified of the Union's charge and request and was given no opportunity to defend himself (R. 32-43; 242). On December 17, 1953, without prior warning, the Company wrote Banez that his employment was terminated

as of that date (R. 42; 301). The letter then went on to explain *(ibid.)*:

> This action is taken as a result of your actions in violation of Section 1 (Recognition and Union Security) of the agreement between Olaa Sugar Co., Ltd., and the United Sugar Workers, ILWU, Local 142, as brought to our attention by the Union.

On December 23, Banez asked Assistant Manager West why he had been discharged (R. 43; 294). West told Banez that the Union had brought up a grievance with respect to his conduct, and that a meeting was held at which it was "brought out" that Banez "was disrupting harmonious relationship with the Company by circulating a petition against the officers of the Union, and was fostering racial discontent among the Filipinos, claiming the Japanese were getting all the breaks in [the] layoff procedure . . ." (R. 43-44; 294-295).

West also told Banez that his work record was very poor, whereupon Banez reviewed his long disagreement with the Union over various issues, such as the union shop, and claimed that the "union officers were out to get him and had brought this action against him for that reason" (R. 44; 264). West replied that the Company was not interested in the internal affairs of the Union but was disturbed by the charge that Banez had stirred up racial discontent (R. 44; 294-295). When Banez asked what steps he could take with respect to his discharge, West informed him that the grievance procedure was open to him but pointed out that it would cost him a considerable sum if he carried the matter through to arbitration (R. 44-45; 295). West also reminded Banez that even if he was success-

ful in regaining his employment, he would still have to "live with the people on the plantation" and advised him that he would probably be happier if he did not spend his money and "maybe attempted to find employment elsewhere" (R. 43-45; 295). Banez, however, assured West that he "wanted to stay and fight the union" which he charged was "communist led" and was "out to get him" (R. 45; 296).

On January 7, 1954, the Company again wrote Banez that the "reason" for his discharge was "violation of Section 1 . . . of the agreement" between the Company and Union "as brought to [the Company's] attention by the Union" (R. 42; 301-302). In conclusion the letter stated: "The details of this violation, as presented to us by the Union, were explained to you at the time of your meeting with assistant manager West on December 23, 1953" *(ibid.)*.

Union members Dela and Revera, who had engaged in conduct similar to Banez', were not discharged (R. 47; 243).

### 3. *The Board's conclusions*

Upon the foregoing facts, the Board concluded that Olaa violated Section 8 (a) (3) and (1) of the Act by entering into an agreement with the Union vesting in the latter the power to bring about the discharge of nonmembers, but not of members, for repeated disruption of working relations, and by discharging nonmember Banez at the Union's request while failing to discharge two union members who had engaged in similar conduct (R. 85-86, 52). The Board also concluded that the Union violated Section 8 (b) (2) and (1) (A) by executing the illegal contract and by causing the Company to discharge Banez (R. 78, n. 2).

### II. The Board's Order

The Board's order requires Olaa and the Union to cease and desist from performing or giving effect to the illegal provision of the contract and from in any other manner violating Sections 8 (a) (1) and (3) and 8 (b) (2) and (1) (A), respectively (R. 89-90, 91-92).

Affirmatively, the order requires the Union to notify the Company in writing that it withdraws its objection to Banez' employment and requests the Company to offer him reinstatement. The order further requires the Company to reinstate Banez and jointly and severally with the Union to make him whole for any loss of pay he may have suffered by reason of the discrimination against him. Finally, the order requires both respondents to post appropriate notices *(ibid.)*

## SUMMARY OF ARGUMENT

I. The contract, applicable to nonagricultural as well as agricultural employees, unlawfully discriminated in favor of Union members by giving the Union the right to demand the discharge of nonmembers under certain circumstances while containing no comparable provision as to members. The execution of a contract containing such a discriminatory provision violated Section 8 (a) (3), 8 (a) (1), 8 (b) (2), and 8 (b) (1) (A). The fact that the Company could discharge Union members for the same conduct is not sufficient to negative the discriminatory and coercive nature of the provision because the Company is not required to do so and the Union can exert no pressure upon it in the case of Union members.

II. Substantial evidence on the record considered as a whole supports the Board's finding that the Company discriminatorily discharged Employee Banez in viola-

tion of Section 8 (a) (3) and (1) of the Act and that the Union unlawfully caused the Company to engage in such conduct in violation of Section 8 (b) (2) and (1) (A). The fact that two Union members who engaged in similar conduct were not discharged demonstrates that the Union's request that the Company discharge Banez and the Company's compliance therewith were not motivated by the alleged disruptive nature of Banez' conduct but by the fact that he was not a member of the Union.

III. Banez was not exempt as an agricultural laborer. His work in transporting sugar cane from the fields to the mill was not "harvesting" but was "incidental to" harvesting; consequently it was exempt only if "performed by a farmer or on a farm." Since much of the transportation took place over public highways, it was not "performed . . . on a farm." Moreover, since the Company obtained nearly half its cane from independent growers, the transportation of such cane was not "performed by a farmer." Even with respect to Company-grown cane, the transportation was incidental to the milling rather than the farming operation. The *Waialua* case, 349 U.S. 254, is distinguishable in that the employer there processed only his own cane, and the transportation from field to mill was exclusively over the employer's own land. The instant case is similar to *Calaf* v. *Gonzalez,* 127 F. 2d 934 (C.A. 1), distinguished in *Waialua,* and to *Chapman* v. *Durkin,* 214 F. 2d 360 (C.A. 5), certiorari denied, 348 U.S. 897.

## ARGUMENT

As stated above, the Board found that respondents violated the Act by entering into a contract which dis-

criminated against nonmembers of the Union, and by applying the discriminatory feature of the contract against truck driver Banez. Respondents' primary ground of defense appears to be that Banez was an agricultural laborer. This defense, however, even if it should be sustained, would not affect the validity of the Board's order with respect to the illegal contract, for the contract applied not only to truck drivers but also to the production employees at the mill. Accordingly in this brief we discuss, first, whether the contract was invalid, and second, whether Banez' discharge was unlawful. The issue as to the agricultural exemption is relevant only to the second question and hence is discussed in connection therewith.

## I

**The Board Properly Found that by Entering into a Contract Vesting in the Union the Power to Cause the Discharge of Nonunion Employees the Company Violated Section 8 (a) (3) and (1) of the Act, and the Union Violated Section 8 (b) (2) and (1) (A)**

The contract in the instant case granted the Union the right to file a grievance alleging that a *nonunion* employee was "disrupting harmonious working relations" and requiring the Company to discipline or discharge him in case of "repeated disruption," but created no corresponding right or obligation with respect to *Union members* guilty of the same conduct. Under settled law, the mere execution of such a contract, even absent proof of discriminatory practices thereunder, would tend to encourage union membership and hence would violate Section 8 (a) (3) and (1), and 8 (b) (2) and (1) (A) of the Act. *Katz* v. *N.L.R.B.,* 196 F. 2d 411, 415 (C.A. 9); *Red Star Ex-*

*press Lines* v. *N.L.R.B.*, 196 F. 2d 78, 81 (C.A. 2); *Eichleay Corp.* v. *N.L.R.B.*, 206 F. 2d 799, 803 (C.A. 3); *N.L.R.B.* v. *F. H. McGraw & Co.*, 206 F. 2d 635, 641 (C.A. 6); cf. *N.L.R.B.* v. *International Brotherhood of Teamsters, etc., Local No. 41*, 225 F. 2d 343 (C.A. 8).

The illegality of a clause which on its face discriminates against nonunion employees is self-evident. By vesting in the Union the power to bring about the discipline or discharge of nonmembers while giving it no power to do so in the cases of employees who are members of the Union, the clause has the "natural consequence"[6] of encouraging employees to join or remain members of the Union. Accordingly, the mere fact that the clause exists, even absent proof of its unlawful application, violates the Act.

Before the Board, the Company denied that the clause was illegal *per se*, pointing to the fact that the Company could, on its own initiative, discipline or discharge Union members for similar conduct. The short answer to this contention is that in such cases, unlike those involving nonunion employees, the Company is not required by contract to take disciplinary action. Moreover, even if it is assumed that the disruption of harmonious working relations might be a valid ground for discharge if unrelated to Union membership or activity, the fact remains that the Union is authorized to demand that the Company act, and the latter is required to act, in the case of nonunion employees but not in the case of Union members. It follows, therefore, that the Union membership or nonmembership of an employee might well be, as indeed it was in this

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[6] *Radio Officers' Union* v. *N.L.R.B.*, 347 U.S. 17, 45.

case, the controlling factor in determining whether an employee will be discharged or not.

Equally without merit is the Company's further contention before the Board that the clause it not illegal because it does not *require* that the Company discipline or discharge a nonunion employee but only obligates it to entertain a grievance in such cases. As the Board pointed out, however, the contract provides that "repeated disruption of harmonious working relations *shall be* grounds for discharge or discipline" (emphasis supplied), thus making it mandatory that the Company take action upon the presentation by the Union of a grievance based upon "repeated disruption of harmonious working conditions" (R. 88). Even if this language is construed as permitting the Company to exercise its discretion, the mere fact that the Union is given the right to request and urge the discipline or discharge of nonmembers only discriminates against nonmembers by rendering their tenure of employment less secure than that of Union members, and hence encourages employees to join or remain members of the Union. It follows therefore that the Board properly found that the contract provision is "discriminatory per se" (R. 86), and that in executing it the Company and the Union violated Section 8 (a) (3) and (1) and 8 (b) (2) and (1) (A) of the Act, precisely as in the cases cited *supra,* pp. 14-15.

## II

**The Board Properly Found that the Company Discriminatorily Discharged Employee Banez in Violation of Section 8 (a) (3) and (1) of the Act, and that the Union Unlawfully Caused the Company to Engage in Such Conduct in Violation of Section 8 (b) (2) and (1) (A)**

### A. Banez was discharged pursuant to the illegal contract

The evidence summarized at pp. 7-11, *supra,* establishes that the Union, acting under the foregoing discriminatory provision of the contract, requested the Company to discipline or discharge nonmember Banez and that, as a result, the Company discharged him for the stated reason that he had violated Section 1 of the contract "as brought to [its] attention by the Union." The Union's demand was based upon a claim that Banez had circulated a petition requesting a general Union membership meeting, and had criticized the Union's officials, charging that they had favored the employees of Japanese extraction and had discriminated against the Filipino employees in working out the lay-off procedure. The Union did not request the Company to discipline or discharge Union members Dela and Revera, and the Company did not do so, although both the Union and the Company knew that these two employees had engaged in conduct similar to that of Banez.

On these facts the Board found that Banez was discharged pursuant to the discriminatory provision of the contract, that Banez would not have been discharged but for his want of Union membership, and that the Union in causing, and the Company in effectuating, the discharge, therefore violated Section

8 (b) (2) and (1) (A) and 8 (a) (3) and (1) of the Act. Respondents contend, however, that notwithstanding the above circumstances Banez was discharged, not for want of Union membership, but for activities unprotected by the Act. We turn to these contentions.

In its brief to the Board, the Company admitted that Banez' "anti-union activity . . . brought the matter to a head by virtue of the complaint registered by the Union." It argued, however, that its discharge of Banez was unrelated to his anti-union activity or the Union's request of October 19, asserting instead that its basic reason was that Banez' charges created racial friction which jeopardized the Company's operations (Br. 19-20). We submit that the record warranted the Board's rejection of this contention.

Although the Company had known since summer that the Filipino employees were disturbed by the lay-off procedure, it made no effort to explain to them the problems involved or to assure them that the layoffs were being handled in a nondiscriminatory manner (R. 265). The Company had also admittedly known of Banez' activity for several months prior to the Union's request, and though the Company claims to have been disturbed thereby (R. 240-241, 246-247, 249, 251-252), it obviously did not consider the problem to be critical, for it had never discussed the matter with Banez nor had it reprimanded him for his conduct (R. 242). In short, the Board could fairly infer that, prior to the Union's request that Banez be disciplined or discharged pursuant to Section 1 of the contract, the Company had no thought of taking punitive action against him.

Moreover, if the motivating factor in the Company's decision had been the alleged disruptive effect of Banez' criticism of the lay-off procedure and not the Union's request, the Company would surely have also dis-

charged on its own initiative, as it asserts it had the right to do, the two Union members who had engaged in similar conduct. It is also significant that the Company twice stated that its reason for discharging Banez was his violation of Section 1 of the contract, "as brought to [its] attention by the Union" and on the second occasion referred to the "details" of the violation "as those" presented "to the Company by the Union," one of which, of course, was his nonmembership in the Union, *supra,* pp. 9-11. In addition, if the Company's real reason had been, as it claims, its fear that Banez' conduct might result in a strike by the field force before harvesting was complete, presumably it would have discharged him in July or August when it first learned of his activity instead of waiting until the close of the cutting season when the danger was past.[7]

Finally, even after the Union's request, the Company did not discuss the matter with Banez. Thus, he was given no opportunity to refute the Union's charges nor was he warned that he would be discharged if he continued to engage in conduct which, in the Company's opinion, stirred up racial friction. Instead, he was summarily discharged while the two Union employees who engaged in similar conduct were retained.

From the foregoing facts, we believe it is clear that, but for the Union's request, a necessary element of

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[7] As demonstrated *infra* pp. 22-23, Banez was not seeking to cause the Filipino employees to strike but was merely trying to secure a general membership meeting of the Union in order to "clear up" the misunderstanding between the rank and file members and the officers, a clearly protected activity. In any event, as the Board pointed out (R. 89), "economic pressures on an employer are no defense to what is otherwise a discriminatory discharge." *N.L.R.B.* v. *McCatron,* 216 F. 2d 212, 215 (C.A. 9), certiorari denied, 348 U.S. 943; cf. *N.L.R.B.* v. *Lloyd A. Fry Roofing Co.,* 193 F. 2d 324, 327 (C.A. 9), and cases cited at n. 5 therein.

which was Banez' nonmembership in the Union, Banez would not have been discharged notwithstanding the nature of his conduct.[8] As the Company admitted, it needed the Union's cooperation in making the change to a mechanized field operation and was anxious that its relations with the Union continue to be satisfactory (R. 227, 240). Accordingly, when the Union persisted in pressing for Banez' discharge, the Company did not resist but discharged him pursuant thereto and for no other reason.[9] It follows, therefore, that the Board

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[8] It having thus been demonstrated that the Company discharged Banez only because the Union requested it to do so, and not because of the nature of his activity, none of the cases cited by the Union and the Company in their briefs to the Board is applicable. In those cases the employer's sole motive for the discharge was a genuine desire to maintain order and not the fact that the employee's conduct constituted or was related to union activity. Thus in *N.L.R.B.* v. *Edinburg Citrus Assoc'n*, 174 F. 2d 353, 355 (C.A. 5), the court noted that the Company would probably have similarly discharged the employees if the situation had been reversed and they had been opposed to the Union, while in the instant case the employer did not discharge the two Union members guilty of the same conduct as Banez.

[9] Before the Board the Company conceded that Banez' alleged poor work record was not the motivating cause for his discharge but was at most only a factor that was considered in determining whether the disciplinary action to be taken under the contract provision should be a discharge. Moreover, the record considered as a whole supports the Board's finding that the Company's claim that Banez' work record played a part in its decision was but a "pretext, belatedly thought of, and seized upon, by the Company in an effort to exculpate itself" for on two occasions the Company wrote Banez that he was discharged because of his "violation of Section 1 . . . of the agreement" (R. 86, n. 10, 45-46; 301-302). Moreover, although in the remote past Banez had twice been demoted, he had been upgraded on 10 occasions, the most recent being in August of the previous year when he was promoted to senior cane truck driver (R. 45-46; 317). Finally, no new complaint had been registered against Banez for several months prior to his discharge, and he had been disciplined for each of his earlier offenses at the time when it occurred (R. 46-47; 313-316).

properly found that in discharging Banez, the Company discriminated against him for exercising the right guaranteed him by Section 7 of the Act to refrain from joining a union, absent a valid union security clause, and that this discrimination necessarily encouraged employees to join or remain members of the Union. See *Radio Officers Union* v. *N. L. R. B.*, 347 U. S. 17, 45, 51-52. Consequently, the Company by enforcing the discriminatory provision of the contract violated Section 8 (a) (3) and (1) of the Act and the Union, by causing the Company thus to discriminate, violated Section 8 (b) (2) and (1) (A).

Equally without merit is the Union's claim that its request was based solely on its desire to eliminate racial friction and was in no way motivated by Banez' nonmembership or by his criticism of the Union's officials. Although Banez joined the Union shortly after he was employed, he paid no dues after 1951 and had long been critical of it, opposing particularly its efforts to obtain a union shop clause in the collective bargaining agreement (R. 287-289). That the Union was in turn antagonistic to Banez and that it was this antagonism rather than concern over racial friction that caused the Union to request his discharge is disclosed by Union Vice Chairman LaTore's account of his investigation when the Union learned that Banez, Dela, and Revera were circulating a petition designed to obtain a general membership meeting at which they could air their complaints. As LaTore expressed it, "I started to check up . . . and compiled all the reports regards . . . this petition circulation, and most particularly how Banez happened to be in the picture. It looks like that ever since Banez had made up his mind to quit from the Union

that he seems to be a mind out of place . . . in any department that he was working with . . .'' (R. 206-207). In LaTore's words, he told the Company that ''Since this . . . petition came along and Brother Banez . . . broke into the picture, that from there on I was appointed to follow up the matter . . .'' (R. 216). In short, the record establishes that although Union members Dela and Revera were engaged in similar conduct, the Union's investigation was directed primarily, if not limited entirely, to securing evidence which could be used against nonmember Banez, thus providing the most convincing proof that the Union's action was determined by the membership or nonmembership of the employees involved rather than by the nature of the activity.

The Union's contention that Banez was seeking to cause a strike by the Filipino employees rests solely upon a conclusionary statement by Vice Chairman LaTore, who cited no evidence to support it (R. 211).[10] In fact LaTore himself testified that the purpose of the petition was to obtain a general membership meeting of the type contemplated by the contract [11] in order to ''clear up some misunderstanding between the rank and file members of the Union and the officers. . . .'' (R.

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[10] Although the Union argued to the Board that the Examiner improperly rejected its offers of proof with respect to the various statements made by Banez, none of these offers attributed any statement to Banez which suggested, either directly or indirectly, that the Filipino employees should strike (R. 200-202, 220-222).

[11] Section 16 of the contract provided that the Company would arrange for a stop-work meeting of not more than 4 hours' duration upon written request by the Union made at least one week in advance. It further provided that there shall not be more than 3 such meetings during any contract year but that an additional meeting can be held for the purpose of ratifying a new agreement between the parties (R. 300).

204). In seeking such a meeting, Banez was exercising his right under Section 7 to engage in concerted activities and to support or refrain from supporting a labor organization. *Salt River Valley Water Users Assn.* v. *N.L.R.B.*, 206 F. 2d 325, 328 (C.A. 9).[12] A membership meeting at which the members could express their views and attempt to induce the Union to alter its position would seem to be an orderly method of obtaining relief and the very antithesis of strike action. While Banez' criticism of the Union clearly reflected and perhaps contributed to employee unrest, it does not follow that it was unprotected by the Act, as the Union argued before the Board, where, as here, its purpose was limited to the wholly legitimate end of obtaining a membership meeting at which the employees' grievance could be fully discussed and a decision reached by majority vote. As this Court has said, "It is obvious that concerted activities which are protected by the Act often create a disturbance in the sense that they create dissatisfaction with the status quo." *Salt River Valley, supra,* 206 F. 2d at 328-329. See also *N.L.R.B.* v. *Nu-Car Carriers, Inc.,* 189 F. 2d 756, 760 (C.A. 3), certiorari denied, 342 U.S. 919.

Finally, the failure of both the Union and the Company to exhibit concern, or take action, with respect to Union members Dela and Revera, who engaged in con-

[12] In its capacity as the exclusive bargaining representative of the employees under Section 9 (a) of the Act, the Union was under a statutory obligation to represent equally all the employees in the unit whether they were Union members or not. *Ford Motor Co.* v. *Huffman,* 345 U.S. 330, 336-337 and cases cited therein. Since Banez believed that the Union's officers had discriminated against the Filipino employees by agreeing to the lay-off procedure, he had a right to criticize the Union's action and urge that a meeting be held at which the Filipino employees could demand that the Union act in a nondiscriminatory manner.

duct similar to that of Banez, conclusively demonstrates that the Union's request that the Company discharge Banez and the Company's compliance therewith resulted from Banez' exercise of his right to refrain from joining the Union. As this Court has recently reiterated, even if an employee's conduct constitutes grounds for discharge, the discharge will violate the Act if in fact the employee would not have been discharged but for his union membership, or want thereof. *N.L.R.B.* v. *Texas Independent Oil Co.,* 232 F. 2d 447, 450, citing *Wells, Inc.* v. *N.L.R.B.,* 162 F. 2d 457, 459-460 (C.A. 9).

B. Banez was not exempt as an "agricultural laborer"

1. *The statutory provisions—the "two branches" of the exemption*

Section 2 (3) of the Act provides that the term "employee" shall not include "any individual employed as an agricultural laborer." Since 1946, Congress has, by means of riders to the Board's annual appropriation, directed that the Board in determining whether employees are agricultural laborers must be governed by the definition thereof in Section 3 (f) of the Fair Labor Standards Act (R. 20, 82, n. 7) [13] This provision reads in pertinent part:

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[13] In appropriating funds for the Board, Congress has annually provided that no part of the appropriation "shall be available to organize or assist in organizing agricultural laborers or used in connection with investigations, hearings, or orders concerning bargaining units composed of agricultural laborers as referred to in Section 2 (3) of the Act of July 5, 1935 (49 Stat. 450), and as amended by the Labor-Management Relations Act, 1947, and as defined in Section 3 (f) of the Act of June 25, 1938 (52 Stat. 1060) . . ."

> Agriculture includes farming in all its branches and among other things includes the cultivation and tillage of the soil . . . the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities . . . and any practices . . . performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

Accordingly, the issue here is whether Banez was within the exemption provided by that Act. See *Dofflemyer* v. *N.L.R.B.*, 206 F. 2d 813 (C.A. 9).[14]

As the Supreme Court stated with respect to this provision in *Farmers Reservoir & Irrigation Co.* v. *McComb,* 337 U.S. 755 at 762-763, "this definition has two distinct branches," the first of which includes "certain specific practices such as cultivation and tillage of the soil, dairying, etc.," and the second of which includes "things other than farming" if "performed either by a farmer or on a farm, incidently to or in conjunction with 'such' farming operations." Following this analysis, we show below that Banez' work falls within neither branch of the exemption.

2. *The "first branch"—transporting cane from field to mill is incidental to "harvesting" rather than "harvesting" itself*

With respect to the first branch of the exemption, it is evident that Banez, a truck driver, was not engaged

[14] The views of the Department of Labor with respect to this issue are set forth in the correspondence reprinted as Appendix B, *infra,* pp. 39-44.

in 'the cultivation and tillage of the soil, dairying, the production, cultivation [or] growing . . . of any agricultural or horticultural commodities." None of those expressions, we submit, would ordinarily be used to describe the work of a truck driver.[15] A somewhat closer question may be presented as to whether a truck driver who drives the loaded truck to the mill but who neither loads nor unloads the vehicle is engaged in "harvesting." That term, broadly construed, might extend beyond the reaping and gathering customarily associated with harvesting, and embrace the transportation of the crop to the mill. But, even aside from the fact that the exemption is to be construed strictly rather than broadly,[16] the language of the statute and authoritative construction thereof establish that the trucking operation in this case is not "harvesting."

The statute expressly indicates that transportation activities, if exempt at all, fall within the second branch of the definition—practices which are exempt if "performed by a farmer or on a farm." See *Farmers Reservoir, supra,* 337 U.S. at 766-767. Thus, the statute does not regard "delivery to storage or to market" as

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[15] In speaking of a related exemption from the Fair Labor Standards Act, the Supreme Court said that "legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood, according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." *Addison* v. *Holly Hill Co.,* 322 U.S. 607, 618.

[16] As this Court has stated, "It is elementary, of course, that the [Fair Labor Standards] Act is remedial and that persons claiming to come within exemptions therein must bring themselves within both the letter and the spirit of the exceptions, *which are subject to a strict construction.*" *Consolidated Timber Co.* v. *Womack,* 132 F. 2d 101, 106, emphasis supplied, and cases there cited; *McComb* v. *Hunt Foods,* 167 F. 2d 905, 908; see also *Phillips Co.* v. *Walling,* 324 U.S. 490, 493, where the Supreme Court observed that "any exemption" from this Act "must therefore be narrowly construed."

"harvesting" but as activities "incident to or in conjunction with" harvesting. This reading is confirmed by the judicial authorities, which have held either that the transportation of crops from field to mill is not exempt at all, or that it meets the second branch of the exemption, i.e., exempt if performed by a farmer or on a farm. *Chapman* v. *Durkin,* 214 F. 2d 360, 363 (C.A. 5), certiorari denied, 348 U.S. 897; *Bowie* v. *Gonzalez,* 117 F. 2d 11, 18 (C.A. 1); *Calaf* v. *Gonzalez,* 127 F. 2d 934, 936-937 (C.A. 1); see also *Maneja* v. *Waialua Agricultural Co.,* 349 U.S. 254, 261, 263, where the Court emphasized that the Company was a "farmer" and that its "transportation system [was] all either in or contiguous to its fields;" cf. *Holtville Alfalfa Mills* v. *Wyatt,* 230 F.2d 398, 402-403, where this Court required further findings before determining the status of truck drivers who performed an operation "integrated with the harvesting" and who worked "as a field unit" with the mowers, rakers, and choppers. Since Banez' work does not constitute "harvesting" but is only "incidental to" harvesting, we turn to "the second branch of the definition of agriculture" to determine whether Banez' work is "performed by a farmer or on a farm." *Farmers Reservoir,* 337 U.S. at 766.

3. *The "second branch"—the transportation in this case was not "performed by a farmer or on a farm"*

a. Driving on the public highways is not work on a farm

We submit that under the facts of this case it cannot reasonably be said that Banez' work was "performed . . . on a farm." Approximately 60 percent of his

driving time was spent on the public highways, in addition to which he also spent time at the mill while the truck was being unloaded. Consequently, as the Fifth Circuit expressly held with respect to the truck drivers in the *Chapman* case, 214 F. 2d at 363, Banez was not employed "on a farm" within the meaning of the exemption (see notes 15 and 16, *supra*). Indeed, except in the case of a large plantation embracing both farmlands and a mill, such as was before the Court in *Waialua* (see 349 U. S. at 257, 216 F. 2d 466 at 472, n. 17, 18), transportation of a farm product to a mill normally embraces travel on the public highways. Such a movement is not "on a farm," and consequently is exempt only if "performed by a farmer." See the legislative history summarized in *Farmers Reservoir,* 337 U. S. at 767. We turn, then, to the question whether Banez' trucking was "work performed by a farmer."

b. Olaa is not "a farmer" in handling cane grown by independents, and even the transportation of Olaa-grown cane was incidental to its milling rather than its farming operations

Olaa's activities in growing its own sugar cane are those of a farmer, but its milling operation is industrial rather than agricultural in character. As a result, its field employees are exempt as agricultural laborers but its mill employees are not. *Maneja* v. *Waialua Agricultural Co.,* 349 U. S. 254, 268, 270. As the *Waialua* case demonstrates, the mill employees would not be exempt even if Olaa processed only sugar grown in its own fields; the exemption is *a fortiori* inapplicable to the mill employees here, for approximately half the sugar processed in the mill comes from

the farms of independent growers. See *Bowie* v. *Gonzalez,* 117 F. 2d 11, 18 (C. A. 1); *Calaf* v. *Gonzalez,* 127 F. 2d 934, 936 (C. A. 1); *Chapman* v. *Durkin,* 214 F. 2d 360, 361-362 (C. A. 5), certiorari denied, 348 U. S. 897; cf. *Farmers Reservoir & Irrigation Co.* v. *McComb,* 337 U. S. 755, 766-767, and see particularly n. 15 at 766; *North Whittier Heights Citrus Assoc.* v. *N. L. R. B.,* 109 F. 2d 76, 79-80 (C. A. 9), certiorari denied, 310 U. S. 632; *Idaho Potato Growers* v. *N. L. R. B.,* 144 F. 2d 295, 296, 301 (C. A. 9). With respect to the milling of Olaa's own cane, however, the question whether Banez was employed as an agricultural laborer when he transported that cane to the mill depends upon whether the transportation was incidental to the growing (exempt) or incidental to the milling (nonexempt). The Board found (R. 81) that "the Company's trucking operation is carried on as an incident to, or in conjunction with, its plant operations, rather than its farming operations." We submit that this finding has ample support in the record, and accords with judicial authorities.

The headquarters of the transportation system are at the mill, rather than in the fields. The truck dispatcher is located at the mill, and there supervises the work of the drivers (R. 32-33; 160-161, 165-167). Moreover, during the nondriving season, the drivers are employed in the mill or in the garage, and not in the fields (R. 52; 186-187). In this respect the instant case is similar to *Calaf* v. *Gonzalez,* 127 F. 2d 934, 938 (C. A. 1), where the court, noting that the headquarters of the transportation system were at the mill, held that truck drivers transporting sugar cane from the fields to the mill were not exempt, although it observed that a different result might obtain if the

"heart of the transportation system and the situs of the employment of the workers were located at the farm." Cf. *N. L. R. B.* v. *Tovrea Packing Co.,* 111 F. 2d 626, 628, certiorari denied, 311 U.S. 668, where this Court held that employees in feeding pens which were "maintained as an incident to and not independent of the operation of the packing plant" were not agricultural laborers.

Further evidence that Banez' transportation is to be viewed as incidental to Olaa's milling, rather than its farming, operations lies in the fact that approximately half of the cane which Banez transported came not from Olaa's farms but from the farms of independent growers. Since Olaa does not function as a "farmer" with respect to this cane, Banez' work in trucking it to the mill is work performed by the processor, not "by a farmer," and hence is outside the exemption. See cases cited *supra,* p. 29. But it would be highly unrealistic, we submit, to draw a distinction between Banez' work when he is transporting cane grown by Olaa and cane grown by independent growers, and since the latter is necessarily incidental to the milling the former should be similarly viewed. Indeed, so far as the record shows, Banez may on occasion transport both Olaa-grown cane and independent-grown cane in the same truckload. Cf. *Calaf* v. *Gonzalez,* 127 F. 2d 934, 936 (C. A. 1); *Wabash Radio Corp.* v. *Walling,* 162 F. 2d 391, 394 (C. A. 6).[17]

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[17] In construing the Fair Labor Standards Act the courts have held an exemption inapplicable to an employee who does a substantial amount of non-exempt work, or whose exempt and non-exempt work is commingled. See, for example, *North Shore Corp.* v. *Barnett,* 143 F. 2d 172, 175 (C.A. 5); *Walling* v. *W. D. Haden Co.,* 153 F. 2d 196, 199 (C.A. 5), certiorari denied, 328 U.S. 866; *Mitchell* v. *Stinson,* 217 F. 2d 210, 217 (C.A. 1); *McComb* v. *Del Valle,* 80 F. Supp. 945, 951 (D. P.R.); *Shain* v. *Armour & Co.,* 50 F. Supp.

In short, Banez was engaged, not in "harvesting" but in work incidental thereto; he was not employed "on a farm," as he spent a substantial amount of time on the highways, and he was not employed "by a farmer" as his work was incidental to Olaa's milling operations, both with respect to the cane Olaa purchased and that which it grew. We now show that these propositions, discussed above, are not in conflict with the authorities relied on by respondents.

4. *The Waialua and Clinton cases are inapposite to the case at bar*

During the proceedings before the Board, respondents relied primarily on this Court's decision in the *Waialua* case, *supra,* which was then pending before the Supreme Court. The ultimate decision by the Supreme Court, although it held the transportation workers in that case to be engaged in agriculture, shows that *Waialua* is distinguishable from the case at bar in two significant respects. In the first place,

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907, 911 (W.D. Ky., per Miller, J.); *Walling* v. *DeSoto Creamery Co.*, 51 F. Supp. 938, 943 (D. Minn.); *Fleming* v. *Swift & Co.*, 41 F. Supp. 825, 831 (N.D. Ill.), affirmed, 131 F. 2d 249 (C.A. 7); *Walling* v. *Peacock Corp.*, 58 F. Supp. 880, 883 (E.D. Wis., per Duffy, J.); *Jordan* v. *Stark Bros.*, 45 F. Supp. 769, 771-772 (W.D. Ark.), *Sykes* v. *Lockmann*, 156 Kan. 223, 132 P. 2d 620, 624, certiorari denied, 319 U.S. 753. See also *Roland Co.* v. *Walling*, 326 U.S. 657, 664; *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 572; *Southern California Freight Lines* v. *McKeown*, 148 F. 2d 890 (C.A. 9). However, the Board, in several representation cases commencing with *Clinton Foods*, 108 NLRB 85, has excluded from bargaining units employees part of whose time was spent in exempt agricultural labor, analogizing their status to employees who spent part of their time as supervisors, 108 NLRB at 89, n. 6. In the instant case, the Board found that none of Banez' work was within the exemption, and the issue before the Court is whether, on this record, Banez as a matter of law is outside the protection of the Act.

Waialua processed only sugar grown on its own farmland; it did not, as does Olaa here, purchase sugar from independent growers. Second, in the *Waialua* case, the cane in moving from the field to the mill was transported solely over Waialua's farmlands, and not as in the instant case over the public highways. In brief, then, Waialua was a farmer, and the transportation occurred on the farm, whereas Olaa—at least with respect to the cane obtained from independent growers—was not a farmer, and much of the transportation occurred off the farm. The importance of these distinctions is attested by the *Waialua* decision itself, for the Supreme Court expressly noted that the *Bowie* and *Calaf* decisions of the First Circuit, 117 F. 2d 11 and 127 F. 2d 934, were not apposite, distinguishing them on the grounds suggested above. See 349 U. S. at 262-263.

Respondents further relied on the Board's decision in *Clinton Foods, Inc.,* 108 N. L. R. B. 85. Of course, the issue before this Court is the validity of the Board's decision in *this* case on *this* record. In any event, as the Board demonstrated (R. 79-81), the *Clinton* case is clearly distinguishable.

Three types of drivers were involved in *Clinton*: (1) "Goat drivers" who hauled fruit from the groves to the roadside and who were found to be agricultural employees; (2) "Semi drivers" who drove semi-trailers from the roadside to the employer's packinghouse or processing plant and who, in accord with the wishes of the parties, were found to be industrial employees; (3) "Flat drivers" whose primary job was hauling fruit from the groves to the plant, a distance of 2 or 3 miles (*id.* at 86). The Board, emphasizing the proximity of the groves to the plant, the fact that when hauling fruit from the groves to the plant the flat drivers spend a sub-

stantial part of their time on farm property, and the fact that the operation was conducted by and for the benefit of the employer who admittedly was engaged in a farming operation, concluded "upon the basis of the present record," that the flat drivers were agricultural employees (*id.*, at 87).

Although both the Company and the Union contended before the Board that the truck drivers in the instant case are like the "flat drivers" in *Clinton,* the Board pointed out (R. 79-80) that since the drivers here haul cane from the roadside to the plant, they are more like the semi-drivers in *Clinton* who were found to be industrial employees.

Moreover, as the Board further noted, even if the cane truck drivers are considered more nearly like the flat drivers in *Clinton,* there are distinguishing factors (R. 80). Thus in *Clinton* the Board relied "particularly" on the proximity of the groves to the plant (3 miles maximum) while here some of the fields are as much as 23 miles distant and a majority are at least 10 miles distant, *supra,* p. 4. Even more important, the flat drivers in *Clinton* hauled fruit "from the groves," as distinguished from the semi-drivers who hauled fruit only "from the roadside," and the former thus spent some of their time in the actual growing area. In contrast, the cane truck drivers here perform no work in the fields, even during the 50 percent of their time when they are hauling Company grown cane; they park the trucks on the roadside (R. 80; 195-196). Finally, the drivers in *Clinton* hauled fruit grown exclusively by their employer while the drivers here spend half of their time hauling cane purchased by the Company in its capacity as a commercial processor, and the entire trucking operation, like that in the *Calaf* case, *supra,*

is thus an incident to Olaa's milling rather than its farming operation.

### 5. *Summary*

The truck drivers in this case are engaged not in "harvesting" but in work incidental thereto; consequently the first branch of the exemption is inapplicable. The second branch is likewise inapplicable, for their work is not performed on a farm, and they are not employed by a farmer. This case, in short, resembles *Chapman* v. *Durkin,* 214 F. 2d 360 (C.A. 5), certiorari denied, 348 U.S. 897, and *Calaf* v. *Gonzalez,* 127 F. 2d 934 (C.A. 1) rather than the *Waialua* case, 349 U.S. 254.[18] It follows that the Board correctly held that Banez was not exempt and that respondents cannot escape liability for his discriminatory discharge.

## CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the order of the Board.

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STEPHEN LEONARD,
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*National Labor Relations Board.*

OCTOBER, 1956.

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[18] Since the Supreme Court denied certiorari in *Chapman* only a month after it granted the writ in *Waialua,* 348 U.S. 870, 897, it would seem that the Court regarded the cases as distinguishable. And, as noted above, p. 32, the Supreme Court itself distinguished *Calaf* from *Waialua,* 349 U.S. at 262-263.

APPENDIX A

1. The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Sec. 151, *et seq.*), are as follows:

Definitions

SEC. 2. When used in this Act—

(3) the term "employee" . . . shall not include any individual employed as an agricultural laborer . . .

* * * * *

Rights of Employees

SEC. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of

employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made . . . : Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of

subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

SEC. 9. (a) Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purpose of collective bargaining in respect to rates of pay, wages, hours, of employment, or other conditions of employment.

* * * * *

Prevention of Unfair Labor Practices

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of

employees with or without back pay, as will effectuate the policies of this Act: * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by

substantial evidence on the record considered as a whole shall be conclusive. * * *

2. The relevant provision of the Fair Labor Standards Act, 52 Stat. 1060, 29 U. S. C. 203 (f), is as follows:

Section 3. As used in this Act—

* * * * *

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in Section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

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APPENDIX B

June 28, 1955

Mr. Stuart Rothman
Solicitor
Department of Labor
Washington, D. C.

Dear Mr. Rothman:

Because of the rider to the Board's appropriation requiring the Board to follow the definition of the term "agriculture" as defined in Section 3(f) of the Fair Labor Standards Act, the Board has before it for deci-

sion a case involving the question as to whether certain truck drivers are "agricultural laborers" as there defined. Accordingly, an interpretive opinion of the status of these truck drivers under Section 3(f) is hereby requested, particularly in the light of the recent decision by the Supreme Court in *Maneja* v. *Waialua Agricultural Co.,* decided May 23, 1955.

The relevant facts are as follows:

The employer of the truck drivers owns and operates both sugar cane fields and a sugar cane processing plant in Hawaii. It processes in the plant not only sugar cane grown in its own fields, but also sugar cane grown by independent growers, divided about 50-50. It has northern fields where the plant is located, and geographically separated southern fields which are about 23 miles from the plant. The fields of the independent growers are contiguous to the employer's fields. The sole function of the employer's truck drivers is to haul the cane by truck from the roadside of the employer's fields and the independent growers' fields to the plant for processing. During the loading at the roadside, the truck drivers just stand around while others do the loading. The general practice in loading this employer's cane and some of the independent growers' cane is to load on a private road of the employer, drive on such road to the public highway, and then use the public highway to the plant, with the drivers spending about 60% of their driving time on the public highways and the remaining 40% of their driving time on the employer's private roads. All of these private roads appear to be contiguous to the fields, but a considerable portion of the public highways used are not contiguous to any of the fields. In fact, a long public highway not contiguous to any of the fields must be used to transport cane from the employer's southern fields to the plant

in the northern fields. And, as already indicated 60% of the employer's transportation system is on the public highways. Also, because half of the employer's processing is for independent growers, the drivers spend about 50% of their time hauling the cane of independent growers. The drivers are considered by the employer to be part of its "harvesting" department, but they work out of, and are supervised from the processing plant.

In view of these facts, the Board would like an opinion as to whether these truck drivers are "agricultural" or non-agricultural, in the light of the *Waialua* decision on the railroad workers involved there.

Because this inquiry involves a pending case, we would appreciate an early reply.

Sincerely,

WILLIAM R. CONSEDINE,
*Acting Solicitor.*

U. S. DEPARTMENT OF LABOR

July 13, 1955

Dear Mr. Consedine:

I have your letter of June 28, 1955 asking for an opinion on the status of certain truck drivers under section 3(f) of the Fair Labor Standards Act, particularly in the light of the recent Supreme Court decision in *Maneja* v. *Waialua Agricultural Company.* You submit the following relevant facts in your letter:

(Letter of June 28 quoted)

It is my opinion that the truck drivers are not employed in "agriculture" within the meaning of Section 3(f) of the Act. Though *Waialua* is not in point since it deals with employees of a single grower-processor, the decision is helpful because of its discussion of two

decisions by the First Circuit involving sugar mills processing their own cane and cane grown by others. The first of these decisions, *Bowie* v. *Gonzelez,* 117 F.2d 11, held the agriculture exemption to be inapplicable to the processing employees of such a mill. Thus, as the Supreme Court expressly recognized in *Waialua,* though transportation employees were not involved in *Bowie,* the decision made it clear that the exemption would not apply to them if they hauled cane grown by independent growers.

In its second decision, *Calaf* v. *Gonzalez,* 127 F. 2d 934, the First Circuit expressly held the exemption to be inapplicable to transportation employees hauling both cane grown by their employer and cane grown by others. It also pointed out that even where the cane being transported is grown exclusively by the employer, the exemption would not apply unless "the evidence disclosed that the heart of the transportation system and the situs of the employment of the workers were located at the farm" (127 F. 2d at 937-938).

In its discussion of *Bowie* and *Calaf,* the Supreme Court did not criticize either case, but, on the contrary, recognized that both were distinguishable from *Waialua.* Neither, said the Court, was "apposite." And, in allowing the exemption for Waialua's railroad employees, the Court expressly rested its decision on its findings that "Waialua's transportation is all either in or contiguous to its fields * * *," and that the "railroad is used *exclusively* for the effectuation of the agricultural function of transporting exempt agricultural workers to the fields, together with their equipment and supplies, and hauling freshly cut cane to the processing plant" (emphasis added). See also *Farmers Irrigation Co.* v. *McComb,* 337 U.S. 755, where the Supreme Court noted that one requirement for exemption is that the practices be incidental to 'such' farming" (Id., 766, n. 15). "Thus," said the Court, "processing on a farm

of commodities produced by *other* farmers is incidental to or in conjunction with the farming operation of the *other* farmers and *not* incidental to or in conjunction with the farming operation of the farmer on whose premises the processing is done. Such processing is, therefore, not within the definition of agriculture," citing with approval *Bowie* v. *Gonzalez,* 117 F. 2d 11 (Id., 766-767; emphasis added).

Very truly yours,

STUART ROTHMAN,
*Solicitor of Labor.*

U. S. DEPARTMENT OF LABOR

July 19, 1955

Dear Mr. Consedine:

I would like to clarify some statements in my letter of July 13, 1955 concerning the *Bowie* and *Calaf* cases.

Contrary to what was said in that letter, the *Bowie* case did involve transportation employees, specifically holding such employees hauling cane to the mill grown by independent growers to be non-exempt. In *Waialua,* the Supreme Court recognized that the *Bowie* case had so ruled. In the *Calaf* case, the First Circuit, after recognizing that it had already disposed of the question involving employees transporting cane grown by independent growers in the *Bowie* case, proceeded to decide the additional question of whether employees transporting cane exclusively grown by the mill owners should also be outside the exemption. In deciding again that the exemption did not apply, the Court based its decision on facts which in its opinion showed that the transportation was incident to milling rather than to farming. As I stated in my previous letter, the Supreme Court regarded both *Bowie* and *Calaf* distinguishable from *Waialua.*

This additional information which I thought you should have does not affect my previous conclusion that the truck drivers are not employed in "agriculture."

Very truly yours,

STUART ROTHMAN,
*Solicitor of Labor.*

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